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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. LEETHIEL PAYNE, Defendant and Appellant.	B206395 (Los Angeles County Super. Ct. No. MA037412)

APPEAL from a judgment of the Superior Court of Los Angeles County, Hayden Zacky, Judge. Reversed and remanded.

Victoria H. Stafford, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Paul M. Roadarmel, Jr. and Eric J. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

Leethiel Payne appeals from his conviction by jury verdict of aggravated battery by gassing upon a peace officer while in state prison. (Pen. Code, § 4501.1, subd. (a).)[1] He challenges the trial court's denial of his *Wheeler*/*Batson*[2] motion; claims the prosecutor improperly vouched for witnesses; claims instructional error; and seeks remand to set the restitution fine. We conclude the trial court erred in finding no prima facie case had been made because the prospective juror excused by the prosecutor "was the first African-American that has been excused. So I don't find that a reasonable inference has been raised that the excuse was made of race alone." We shall order a conditional remand for the limited purpose of conducting the *Wheeler/Batson* analysis under the proper standards. We find no basis for reversal in appellant's claims of prosecutorial misconduct or sentencing error. We agree with appellant that the trial court did not recognize its discretion in setting a restitution fine under section 1202.4 and direct the trial court on remand to exercise that discretion in the event that, based on a proper analysis, it rejects the *Wheeler*/*Batson* challenge.

FACTUAL AND PROCEDURAL SUMMARY

Since appellant does not challenge the sufficiency of the evidence to support his conviction, we limit our review to a brief factual history. Appellant was an inmate housed in an administrative segregation unit at the state prison in Lancaster. When correctional officer Jason De Britz opened the food port in appellant's cell door to pass him clean linens, appellant threw a brown liquid that smelled of feces and urine through the port up at De Britz. The material flew up under the face mask and shield that De Britz was wearing, hitting him on the face and torso.

Appellant was charged and convicted of aggravated battery on a peace officer while in state prison under section 4501.1, subdivision (a). The jury found true

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1 Statutory references are to the Penal Code unless otherwise indicated.

2 *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*); *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*).)

allegations that he had two prior serious felony convictions within the meaning of the "Three Strikes" law. (§§ 1170.12, 667, subds. (b)-(i).) Appellant was acquitted of a second count of battery under section 4501.5.

Appellant was sentenced to a term of 25 years to life, consecutive to the term he already was serving. Restitution fines of $10,000 and a court security fee of $20 were imposed (§§ 1202.4, 1202.45). This timely appeal followed.

DISCUSSION

I

"Both the federal and state Constitutions prohibit any advocate's use of peremptory challenges to exclude prospective jurors based on race. (*Batson, supra,* 476 U.S. at p. 97; *Georgia v. McCollum* (1992) 505 U.S. 42, 59; *Wheeler, supra,* 22 Cal.3d at pp. 276-277.) Doing so violates both the equal protection clause of the United States Constitution and the right to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution. [Citations.]" (*People v. Lenix* (2008) 44 Cal.4th 602, 612 (*Lenix*).) The *Batson* three-step inquiry is well established. """First, the defendant must make out a prima facie case 'by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.' [Citations.] Second, once the defendant has made out a prima facie case, the 'burden shifts to the State to explain adequately the racial exclusion' by offering permissible race-neutral justifications for the strikes. [Citations.] Third, '[i]f a race-neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial discrimination.' [Citation.]""" (*People v. Hawthorne* (2009) 46 Cal.4th 67, 78.)

Our discussion is confined to the first step of the *Batson/Wheeler* analysis because the trial court did not ask the prosecutor to provide reasons for excusing the juror and the prosecutor did not state a reason for the challenge. The court found that no prima facie

case was made by appellant.[3] Appellant argues the trial court applied the wrong standard in rejecting his claim that the prosecutor exercised a peremptory challenge to excuse Juror No. 20 for an improper purpose.

On voir dire, Juror No. 20, an African-American woman, testified that she lives in Lancaster and is a single retired school teacher with no children. Before retiring she taught adult English as a second language. She had no prior jury experience. When asked whether she had any "yes" answers to the questions previously asked, Juror No. 20 acknowledged that she did. She explained that she knew two Los Angeles Police Department officers. She also stated that, 40 years before, she had been the victim of an attack and attempted rape. Although the crime was reported to the police, no arrest was ever made. When asked whether there was anything about that experience that would affect her ability to be a fair and impartial juror, she said "'No.'" She also said she knew someone who was arrested for drug possession, but would be able to set that aside and give each side a fair trial.

The next day the People exercised a peremptory challenge and excused Juror No. 20. The defense attorney asked to approach and said: "Your honor, I just wanted to make a *Wheeler* motion as to the dismissal of No. 20. I didn't see anything that was negative towards her being a juror and I notice she's one of the few black jurors we do have." The court responded: "We do have juror No. 15 is an African-American female. She's currently seated in seat No. 1. Juror No. 20 who was just excused appeared to be an African-American female as well, middle-aged, retired teacher who is single with no prior jury experience. Obviously that juror is a member of recognizable group, an African-American. That was the first African-American that has been excused. So I don't find that a reasonable inference has been raised that the excuse was made of race

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3 The comparative juror analysis approved by the court in *Miller-El v. Dretke* (2005) 545 U.S. 231, does not apply to the first stage of the *Wheeler/Batson* analysis. (*People v. Lenix*, *supra*, 44 Cal.4th at p. 622, fn. 15; *People v. Carasi* (2008) 44 Cal.4th 1263, 1295-1296.)

alone. So that's denied." The prosecutor did not volunteer any reasons for excusing Juror No. 20.

After the jury was selected, the trial court said: "Just to put one last thing on the record with respect to the *Wheeler* motion that the defense brought before, I just wanted to note for the record that alternate No. 1 is an African-American juror, No. 1 who is on the jury and the People only exercised one challenge that excused the African-American individual from the jury."

It is clear from the trial court's statement that it applied the reasonable inference standard. Under these circumstances we apply a deferential standard of review, considering only whether substantial evidence supports the trial court's conclusions. (*People v. Bonilla* (2007) 41 Cal.4th 313, 341-342.) We consider the entire record of voir dire of the challenged juror. (*People v. Gray* (2005) 37 Cal.4th 168, 186; *Johnson* v. C*alifornia* (2005) 545 U.S. 162.)

Appellant argues the trial court applied an incorrect legal standard by finding he had failed to make a prima facie case for the sole reason that Juror No. 20 was the first African-American to be excused. Citing cases from the federal circuit courts, he argues that the striking of a single African-American juror for racial reasons, although other African-American jurors are seated, is improper, even where there were valid reasons for striking some black jurors. He contends the only possible reason to excuse Juror No. 20 was racial bias. Appellant contends *Wheeler/Batson* error is reversible per se. Alternatively, he seeks a remand for an inquiry into the prosecutor's reasons for excusing the juror.

Respondent points out that "'Under *Wheeler*, there is a presumption that a prosecutor uses his peremptory challenges in a constitutional manner. [Citation.]' [Citation.]" (*People v. Ayala* (2000) 24 Cal.4th 243, 260.) Respondent relies on *People v. Yeoman* (2003) 31 Cal.4th 93, 116, which held that on review of a trial court ruling that no prima facie case of group bias was made, "If the record suggests grounds upon which the prosecutor might reasonably have challenged the prospective jurors in question, we affirm." Respondent argues the facts that defense counsel did not see a basis to excuse

Juror No. 20 and that the juror was one of the few African-Americans on the panel is insufficient to make a prima facie case of *Wheeler*/*Batson* error.

Respondent contends the trial court properly considered whether a reasonable inference was raised that Juror No. 20 was excused based on race alone. Respondent contends the trial court's conclusion that no reasonable inference demonstrated was based on a proper consideration of the voir dire and argument of counsel. Finally, respondent cites Juror No. 20's testimony that the person responsible for attacking her 40 years before was never brought to justice as a race-neutral reason for excusing her.

In *Johnson v. California*, *supra*, 545 U.S. 162, the United States Supreme Court rejected California's requirement that the party objecting to the use of peremptory challenges "'show that it is more likely than not the other party's peremptory challenges, if unexplained, were based [on] impermissible group bias.' [Citation.]" (*Id*. at p. 168.) It held that this is an "inappropriate yardstick by which to measure the sufficiency of a prima facie case." (*Ibid.*)

The California Supreme Court recently articulated the requirements for a prima facie case: "To make a prima facie showing of group bias, 'the defendant must show that under the totality of the circumstances it is reasonable to infer discriminatory intent.'" (*People v. Davis* (2009) 46 Cal.4th 539, 582, quoting *People v. Kelly* (2007) 42 Cal.4th 763, 779.) The *Davis* court examined the types of evidence on which a prima facie case may be based: "'Though proof of a prima facie case may be made from any information in the record available to the trial court, we have mentioned "certain types of evidence that will be relevant for this purpose. Thus the party may show that his opponent has struck most or all of the members of the identified group from the venire, or has used a disproportionate number of his peremptories against the group. He may also demonstrate that the jurors in question share only this one characteristic—their membership in the group—and that in all other respects they are as heterogeneous as the community as a whole. Next, the showing may be supplemented when appropriate by such circumstances as the failure of his opponent to engage these same jurors in more than desultory voir dire, or indeed to ask them any questions at all. Lastly, . . . the defendant need not be a

member of the excluded group in order to complain of a violation of the representative cross-section rule; yet if he is, and especially if in addition his alleged victim is a member of the group to which the majority of the remaining jurors belong, these facts may also be called to the court's attention.'" [Citations.]" (*Id.* at p. 583.)

The use of a peremptory challenge to excuse a single juror for racially discriminatory reasons is improper under *Wheeler/Batson*: "When a party makes a *Wheeler* motion, the issue is not whether there is a pattern of systematic exclusion; rather, the issue is whether a particular prospective juror has been challenged because of group bias. (*Wheeler, supra,* 22 Cal.3d at p. 280.) . . . Of course, a single discriminatory exclusion may also violate a defendant's right to a representative jury." (*People v. Avila* (2006) 38 Cal.4th 491, 549.)

The language employed by the trial court in denying appellant's motion is inconsistent with this rule. As we have seen, the trial court emphasized that Juror No. 20 was the first African-American excused by the prosecutor and concluded: "So I don't find that a reasonable inference has been raised that the excuse was made of race *alone*." (Italics added.) The proper inquiry was whether "the sum of the proffered facts gives 'rise to an inference of discriminatory purpose'" (*Johnson v. California, supra,* 545 U.S. at p. 169) even though only a single African-American juror had been excused. The trial court did not make this inquiry and therefore erred.

Appellant seeks reversal based on this error. Respondent claims there was no error. We invited the parties to brief the propriety of a limited remand for a proper analysis of the *Wheeler* motion under the principles we have discussed. In *Johnson v. California, supra,* 545 U.S. 162, the Supreme Court found that the inferences of discrimination were sufficient to establish a prima facie case under *Batson,* and remanded the matter to the California Supreme Court "for further proceedings not inconsistent with this opinion." (*Id.* at p. 173.) Each side has responded and both agree that, if the record before us supports the inference of *Wheeler*/*Batson* error, remand is appropriate. We agree.

On remand, in *Johnson*, the California Supreme Court examined what further proceeding would be appropriate where a trial court errs in not moving on to steps two and three of the *Wheeler/Batson* analysis. (*People v. Johnson* (2006) 38 Cal.4th 1096, 1099.) The defendant argued that a full reversal for new jury trial was required. (*Ibid.*) The Attorney General argued that the matter should be remanded to the trial court to conduct steps two and three of the analysis, as do federal courts in these circumstances. (*Ibid.*) Recognizing that it had previously declined to order a limited remand for these purposes (see e.g. *People v. Snow* (1987) 44 Cal.3d 216), the *Johnson* court adopted the federal approach. (*Johnson, supra*, at p. 1100.) Rejecting the defendant's claims that too much time had elapsed to allow a fair proceeding, the court observed: "[T]he court and parties have the jury questionnaires and a verbatim transcript of the jury selection proceeding to help refresh their recollection. The prosecutor may have notes he took during the jury selection process." (*Id.* at p. 1102.)

In *People v. Hutchins* (2007) 147 Cal.App.4th 992, we held that the appropriate remedy for the trial court's use of an erroneous standard in ruling on a *Wheeler/Batson* motion was a limited remand for the court to use the proper standard. (*Id.* at p. 999.) We reviewed the factors identified by the court in *People v. Johnson, supra*, 38 Cal.4th 1103-1104. In *Hutchins*, the voir dire had occurred a little over a year before, there were detailed trial transcripts, both sides filed written motions on the issue, and the prosecutor had taken notes during voir dire. Under these circumstances, we concluded that a limited remand was appropriate so the trial court could reconsider the third *Batson* step under the proper legal standard. (*Ibid.*) We ruled: "On remand, we direct the trial court to consider whether appellant met his burden of proof under a preponderance of evidence standard. 'If the [trial] court finds that, due to the passage of time or any other reason, it cannot adequately address the issues at this stage or make a reliable determination, or if it determines that the prosecutor exercised [her] peremptory challenges improperly, it should set the case for a new trial.' (*People v. Johnson, supra,* 38 Cal.4th at p. 1104.) If it finds that appellant has not carried his burden of proving, by a preponderance of evidence, that the prosecutor's peremptory challenge was based on purposeful race

discrimination, it should reinstate the judgment. (See *ibid*.)" (*Hutchins*, *supra*, 147 Cal.App.4th at p. 999*;* see also *People v. Kelly* (2008) 162 Cal.App.4th 797 [rejecting defendant's challenges to procedure on limited remand conducting new hearing under *Wheeler/Batson*].)

On remand, we direct the trial court to determine whether appellant made a prima facie case. If a prima facie case is found, the prosecutor is to be allowed to state her reasons for excusing Juror No. 20. If she offers a race-neutral explanation, the trial court must evaluate that explanation and determine whether appellant has shown purposeful discrimination. If the trial court finds the prosecutor exercised the challenges in a permissible fashion, it should reinstate the judgment. If the court is unable to make this determination, it should set the case for a new trial. (See *People v. Kelly*, *supra*, 162 Cal.App.4th at p. 799.)

Because our reversal is conditional, we turn to the other issues raised by appellant.

II

Appellant contends the prosecutor committed misconduct in closing argument by vouching for the credibility of three correctional officers. A brief review of the testimony is necessary to place the argument in context.

In his defense, appellant had testified to mistreatment by Officer De Britz, Officer Macias, and other officers. According to appellant, he was placed in administrative segregation for four months for an assault on Officer Macias, but it was Officer Macias who actually assaulted him. After that incident, he was repeatedly threatened and verbally abused by Officer De Britz and other correctional officers.

On July 20, 2006 following a conference to determine whether he would be moved from administrative segregation, appellant was being escorted to his housing unit by Officer De Britz. Two other officers also were in the group, each escorting another prisoner. Officer De Britz testified that appellant began trying to pull away, and kicked

him. According to Officer De Britz, he forced appellant to the ground and held him until staff responded. He was relieved of his escort and left.[4]

Officer Michael Porter, who was in front of Officer De Britz, heard the commotion, and saw De Britz holding appellant on the ground. After the sergeant arrived, Porter was directed to escort appellant to the sergeant's office. Officer Porter saw a small abrasion on appellant's head. The incident in which appellant threw feces and urine on Officer De Britz occurred two days later. Officer Porter also was a witness to that incident.

Lieutenant James Middleton testified that he conducted a hearing regarding the gassing incident. During that hearing, appellant pled not guilty, but admitted that he threw urine, but not feces, on Officer De Britz.

In her opening summation, the prosecutor argued the credibility of the testimony given by Officers De Britz and Porter and Lieutenant Middleton. Defense counsel began her argument by saying that the prosecutor must have been naïve to contend that the correctional officers had no biases and no motives to lie. She argued that the officers' support for each other would cause them to lie or cover up for one another "when a misdeed is done." In addition, defense counsel argued the officers had a motive to lie to get a better result in civil litigation brought by appellant. She also argued that the absence of surveillance cameras in the unit where the incidents took place must have been deliberate in order to enhance the credibility of the correctional officers by ensuring there was no record of incidents with prisoners.

Appellant's claim of prosecutorial misconduct is based on the prosecutor's rebuttal argument: "Now, the defense counsel expects you to believe that these three men, Officer De Britz, Officer Porter and Lieutenant Middleton, came in here, took an oath, swore to tell the truth, sat up on that witness stand and lied to all of you, risking their credibility, risking their reputations, and risking their careers. All three of those men. For what? To cover up the scratch on the defendant's head? To cover up the fact that he

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[4] This incident was the basis for count two, the battery charge of which appellant was acquitted.

was pepper sprayed? All three of these men came in here and risked everything just because they don't like him because he was charged with a 288 conviction? Does that make sense to you? Is that reasonable?"

According to appellant, this was improper vouching for the credibility of the correctional officers. Anticipating respondent's argument, he claims that the argument was preserved for appeal despite the fact that his trial counsel did not object, invoking an exception where there is a grave doubt as to a defendant's guilt in a closely balanced case, citing *People v. Champion* (1995) 9 Cal.4th 879, 942, overruled on another ground in *People v. Combs* (2004) 34 Cal.4th 821, 860. He contends that this is such a case because no physical evidence of the gassing attack was preserved and "the remaining evidence was close enough for the misconduct to have been a determinative factor."

Alternatively, appellant contends the failure of defense counsel to object to the argument constituted ineffective assistance of counsel. (*Strickland v. Washington* (1984) 466 U.S. 668, 694.) He asserts that there can be no rational basis for failing to object to the prosecutor's improper argument. The failure to object was prejudicial, he claims, since the jury disbelieved Officer De Britz's testimony about the kicking incident and acquitted appellant of that offense. He contends that he was convicted of the gassing charge only because the prosecutor improperly bolstered her case by vouching for the correctional officers.

Respondent argues the issue was not preserved for appeal; that it is more appropriately addressed in a petition for habeas corpus; and that there was no misconduct. We do not agree that habeas corpus is the appropriate vehicle. The issue may properly be reviewed and resolved on the record before us. It is not necessary to defer review for a petition for writ of habeas corpus.

"To preserve a claim of prosecutorial misconduct for appeal, a criminal defendant must make a timely objection, make known the basis of his objection, and ask the trial court to admonish the jury." (*People v. Brown* (2003) 31 Cal.4th 518, 553.) The purpose of this rule is to give the court an opportunity to admonish the jury, instruct counsel, and to avoid the necessity of a retrial. (*Ibid.*) We have reviewed *People v. Champion*, *supra*,

9 Cal.4th at page 942, which was cited by appellant to excuse his failure to object to the alleged misconduct. We find no support for appellant in that case. The Supreme Court ruled that various claims of prosecutorial misconduct had not been preserved because of the failure of defense counsel to object at trial. (*Id*. at pp. 939-942.) More importantly, the Supreme Court in *People v. Bonilla*, *supra*, 41 Cal.4th at page 336 held that the "'close case'" exception had been "soundly repudiated" in *People v. Green* (1980) 27 Cal.3d 1, 27-34.) We conclude appellant failed to preserve his claim for appeal.

In any event, his assertion of error is without merit. "'It is misconduct for prosecutors to bolster their case "by invoking their personal prestige, reputation, or depth of experience, or the prestige or reputation of their office, in support of it." [Citation.]'" (*People v. Riggs* (2008) 44 Cal.4th 248, 302, quoting *People v. Bonilla*, *supra*, 41 Cal.4th at p. 336.) But the Supreme Court in *Bonilla* held that limits on vouching "do not preclude all comment regarding a witness's credibility. '"'[A] prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom.'"' [Citation.] '[S]o long as a prosecutor's assurances regarding the apparent honesty or reliability of prosecution witnesses are based on the "facts of [the] record and the inferences reasonably drawn therefrom, rather than any purported personal knowledge or belief," her comments cannot be characterized as improper vouching.' [Citations.]" (*People v. Bonilla*, *supra*, 41 Cal.4th at pp. 336-337.)

Here, the prosecutor's rebuttal about the credibility of the correctional officers was based on the evidence and constituted fair comment in response to the closing argument made by defense counsel. The prosecutor did not suggest that she had information outside the record that supported the credibility of the witnesses. Rather, she challenged the defense counsel's argument that the officers had a motive to lie. Nothing in the prosecution's argument asked the jury to "abdicate its responsibility to independently evaluate for itself whether [the officers] should be believed." (*People v. Bonilla*, *supra*, 41 Cal.4th at p. 338.) We find no improper vouching and no prosecutorial misconduct.

This conclusion disposes of appellant's alternative argument that he was deprived of effective assistance of counsel by his trial attorney's failure to object to the prosecutor's argument. In order to establish a claim of ineffective assistance of counsel, a defendant must show prejudice under the test of a reasonable probability of a different outcome. (*People v. Memro* (1995) 11 Cal.4th 786, 818.) Since there was no prosecutorial misconduct, an objection would not have led to a different outcome.

III

Appellant's third argument is that the trial court had a sua sponte duty to instruct on battery as a lesser included offense to battery by gassing because there was substantial evidence to support the lesser offense.

The trial court has a duty to instruct on "'all theories of a lesser included offense which find substantial support in the evidence.' [Citation.]" (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 217.) But no instruction on a lesser included offense need be given where there is no evidence that the offense committed was less than that charged. (*People v. Cruz* (2008) 44 Cal.4th 636, 664, citing *People v. Breverman* (1998) 19 Cal.4th 142, 154.)

Respondent does not dispute that battery by a prisoner on a nonprisoner (§ 4501.5)[5] is a lesser included offense of battery by gassing (§ 4501.1).[6] As respondent points out, the evidence here, if believed, established the aggravated offense of battery by gassing. Officer De Britz testified that he was certain that the substance which appellant

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[5] Section 4501.5 provides: "Every person confined in a state prison of this state who commits a battery upon the person of any individual who is not himself a person confined therein shall be guilty of a felony . . . ."

[6] Section 4501.1, subdivision (a) provides in pertinent part: "(a) Every person confined in the state prison who commits a battery by gassing upon the person of any . . . employee of the state prison is guilty of aggravated battery . . . . [¶] (b) For purposes of this section 'gassing' means intentionally placing or throwing, or causing to be placed or thrown, upon the person of another, any human excrement, or other bodily fluids or bodily substances or any mixture containing human excrement or other bodily fluids or bodily substances that results in actual contact with the person's skin or membranes."

threw on his face and upper torso consisted of feces and urine. Officer Porter testified that the substance looked and smelled like feces and that it appeared to be on Officer De Britz's face as well as his uniform shirt and undershirt. According to Lieutenant Middleton, during the hearing on the incident, appellant admitted to throwing urine, but not feces, on Officer De Britz. In his testimony, appellant denied throwing anything on Officer De Britz and said he was immediately pepper sprayed by the officer.

Appellant speculates that the jury "would have wondered why the prosecutor did not bring a face mask to court [like that worn by Officer De Britz] to demonstrate how the substance could have been thrown under it." He cites argument by defense counsel in closing that Officer De Britz would not have first pepper sprayed appellant before removing feces from his face.

There was no evidence that appellant was guilty of the lesser included offense of battery rather than battery by gassing. The trial court did not have a sua sponte duty to instruct on the lesser included offense.

IV

Finally, appellant argues the case must be remanded to allow the trial court to properly exercise its discretion in setting the amount of a restitution fine under section 1202.4. The trial court imposed what it described as a mandatory $10,000 restitution fine, and an identical parole revocation fine was imposed and stayed pending appellant's successful completion of parole. Defense counsel objected that the maximum fine should have been $200 because appellant is an indigent inmate without the ability to pay the fine. The trial court responded: "Well, if he has no ability to pay, then he obviously won't be forced to pay it. But I have to impose that as a matter of law. You take the $200 and you multiply it by the length of the sentence, Mr. Payne. That's how . . . the formula is calculated."

At the time of sentencing in 2008, section 1202.4, subdivision (b) provided in pertinent part: "In every case where a person is convicted of a crime, the court shall impose a separate and additional restitution fine, unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record. [¶] (1)

The restitution fine shall be set at the discretion of the court and commensurate with the seriousness of the offense, but shall not be less than two hundred dollars ($200), and not more than ten thousand dollars ($10,000), if the person is convicted of a felony, . . ." Subdivision (b)(2) of section 1202.4 provided that the court may determine the amount of the restitution fine "as the product of two hundred dollars ($200) multiplied by the number of years of imprisonment the defendant is ordered to serve, multiplied by the number of felony counts of which the defendant is convicted."

The court in *People v. Urbano* (2005) 128 Cal.App.4th 396 explained that the amount of the restitution fine under section 1202.4, subdivision (b)(1) is at the discretion of the court and requires a statement of formal reasons on the record. (*Id.* at p. 405.) It concluded: "Unless there are '"compelling and extraordinary reasons,"' the defendant's 'lack of assets' and 'limited employment potential' are 'not germane' to his or her ability to pay the fine. [Citation.] In the absence of a contrary showing, the court is entitled to presume the defendant will pay the restitution fine out of future earnings. (*People v. Frye* (1994) 21 Cal.App.4th 1483, 1486-1487; § 1202.4, subd. (d).)" (*Urbano*, at p. 405.)

It is apparent that the trial court did not recognize its discretion under former section 1202.4 in setting the amount of the restitution fine. On remand, if the conviction is reinstated, the trial court is directed to exercise that discretion and determine the appropriate restitution fine under section 1202.4.

DISPOSITION

The judgment is reversed and remanded for a new hearing on appellant's challenge to the prosecutor's exercise of her peremptory challenge to Juror No. 20. If the trial court finds no prima facie case was made at the first step of the *Wheeler* analysis, or in the third step of the *Wheeler* analysis determines the challenge was exercised for a race-neutral reason, the trial court shall then determine the proper amount of restitution fine under section 1202.4 and reinstate the judgment. If, on the other hand, the trial court concludes that the prosecutor exercised the challenge to Juror No. 20 on the basis of that juror's race, the judgment shall remain reversed and a new trial is to be ordered.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

EPSTEIN, P.J.

We concur:

WILLHITE, J.

SUZUKAWA, J.